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In the Supreme Court of the United States

OCTOBER TERM, 1960

WICHITA TELEVISION CORPORATION, INCORPORATED, D/B/A KARD-TV, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-10a) is reported at 277 F. 2d 579. The orders of the Court of Appeals denying the petition for rehearing and the petition for rehearing *en banc* (Pet. 10a-11a) are not reported. The Board's Decision and Order (R. 70-83, 8-66) is reported at 122 NLRB 222.

JURISDICTION

The decree of the court below (Pet. 11a) was entered on June 3, 1960. The petition for a writ of certiorari was filed on August 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Trial Examiner acted within his discretionary authority to control the presentation of evidence in sustaining objections to a line of questioning by petitioner's counsel.

2. Whether the Board adequately informed petitioner of the basis of its disposition of the exception taken to the ruling of the Trial Examiner with respect to such questioning.

3. Whether the Court of Appeals properly exercised its discretion in declining to reopen the record for the taking of additional evidence.

4. Whether the order of the Court of Appeals denying the petition for rehearing *en banc* was valid.

STATUTE INVOLVED

The relevant statutory provisions are set forth in the Appendix to the Petition (Pet. 13a-14a).

STATEMENT

A. The proceedings before the Board

1. *The Board's findings and order*

Union organizational activities among petitioner's production employees at its television station in Wichita, Kansas, began in May, 1956 (R. 10; 114-115). Within a few days, petitioner's officials became aware of the activity and took immediate steps to identify its leaders and to discourage its success. Employees were questioned about their knowledge of the Union[1] and were requested to report anything they heard (R. 98-99, 151, 193). On May 11, 1956, petitioner received a letter requesting recognition of the Union, and naming the employees who had designated it as their bargaining representative (R. 104-105, 119-120, 523-525). An hour later, petitioner discharged employee Gordon Coker, who had been identified to petitioner as the leader of the Union movement (R. 104-105, 120, 126-127). Later the same day, petitioner discharged employee Frank Neal, who had been previously questioned by petitioner's production supervisor about the Union (R. 150-152, 193-194).

Petitioner continued to express its opposition to the Union by questioning and threatening employees respecting their union activities, and on June 2, 1956, the employees struck in protest against the discharges

[1] International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Motion Picture Projectionists, Local 111, AFL-CIO.

of Coker and Neal and petitioner's refusal to recognize the Union (R. 144-145, 174-175, 194, 208-209, 213-214, 220-222, 226, 229, 282, 425). Petitioner called the employees who did not report for work and who were not on the picket line, and threatened them with discharge if they failed to cross the picket line (R. 188, 222-223, 282, 143-144). Petitioner thereafter replaced all those who did not come to work (R. 459-460). Picketing ceased and the striking employees applied for reinstatement on July 16, 1956, but petitioner did not put any of the strikers back to work. The Union again requested by letter in December, 1956, that the strikers be reinstated, but petitioner did not reply, nor did it inform the Union or the strikers of its reasons for denying them reinstatement (R. 396-397, 402, 530, 531).

The Board concluded, upon the basis of the foregoing, that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employees Coker and Neal and by refusing to reinstate the strikers upon their request to return to work, and that petitioner committed independent violations of Section 8(a)(1) by threatening and interrogating its employees about the Union. The Board also found that the strike was caused, at least in part, by petitioner's unfair labor practices, and accordingly, in addition to enjoining the unlawful conduct of petitioner, it ordered that the strikers be reinstated with back pay to the date of their request for reinstatement. (R. 70-80).

2. The Trial Examiner's ruling on the exclusion of evidence relating to misconduct of the strikers

During the hearing before the Trial Examiner, counsel for petitioner called one of the strikers, Darrell McOsker, to the stand and asked a series of questions which were designed to show "the knowledge that these pickets had" as to the identity of persons who had committed tortious acts during the strike (R. 431, 425-430). It had previously been established that property damage to petitioner and some of the non-strikers had occurred during the strike, but no evidence had been introduced identifying the guilty parties (R. 442).[2] Counsel for petitioner stated the purpose of the line of questioning was twofold: (1) to show that petitioner "had a reasonable basis for believing" that the strikers were guilty of misconduct and that petitioner therefore lawfully denied them reinstatement; and (2) to show that the strikers in fact were the guilty parties and that the Board therefore should apply its usual rule of withholding the reinstatement remedy from employees who are guilty of serious strike misconduct (R. 431).

On objection by the attorney for the General Counsel of the Board, the Trial Examiner precluded petitioner from continuing with this line of questioning

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[2] Commission of these acts was not established by testimony but is in the record as an offer of proof which was rejected upon petitioner's inability to identify by competent evidence the persons responsible for the acts (R. 326-339, 442). A counter-offer of proof was made to establish that the property damage involved was unconnected with the strike (R. 366-367).

(R. 442). In making his ruling, the Trial Examiner, observed that misconduct by strikers was a "line of inquiry" which he "suspected we will go into" (R. 433). However, noting that counsel for petitioner had admitted that he had no knowledge of whether the witness had any relevant information about the matter, and that he had not made any investigation in this respect before calling the witness to the stand, the Trial Examiner concluded: "I think that there are proper ways of proving matters, I don't think this is the way it should be done" (R. 440, 442). No further effort was made by petitioner to adduce evidence that the strikers had committed any misconduct.

The Board "reviewed the rulings of the Trial Examiner made at the hearing," and adopted them (R. 71).

B. The Decision of the Court of Appeals

The court below sustained the Board's findings as supported by substantial evidence, and enforced the Board's order in full. With respect to the matters raised by the instant petition, the court below held that "The Board's decision, including that part adopted from the Trial Examiner's report, sufficiently informed respondent of the disposition of all of its exceptions" (Pet. 9a), and that although "There was evidence of acts of a serious nature during the maintenance of the picket line, * * * there was no proof that any identified striker, or for that matter any unidentified striker, took part in such acts" (Pet. 8a-9a). In addition, the opinion states that "As to the

several other contentions of [petitioner], they have been disposed of by what has heretofore been said or have been considered and found to be without merit" (Pet. 10a).

Following decision of the court below, petitioner filed a petition for rehearing, a petition for rehearing *en banc*, and a motion to reopen the record to adduce additional evidence. An affidavit of employee Frank Neal was attached thereto, alleging that he, Coker, and other strikers had participated in certain acts of misconduct during the strike. The court below thereafter entered two orders. In one, the division of the court which had heard the case (which included a retired member of the court, Judge Huxman) denied the petition for rehearing. In the other, the court, comprised of all its active judges and Judge Huxman, denied the petition for rehearing *en banc*. (Pet. 10a, 11a.)

ARGUMENT

The decision below is correct, it does not conflict with that of any other court of appeals, and no issue warranting review by this Court is presented.

1. Petitioner does not challenge the correctness of the Board's unfair labor practice findings, but merely the propriety of the Trial Examiner's ruling sustaining an objection to the interrogation of strikers as to whether they knew the identity of the persons responsible for certain property damage during the strike (Pet. 15-18), and the Board's adoption of that ruling without further explication (Pet. 18-21). There is no merit to petitioner's contentions.

Contrary to petitioner's view, the evidentiary ruling of which it complains did not "entirely cut off petitioner from establishing a connection between the serious misconduct and the striking employees" (Pet. 16). The basis for the objection to petitioner's line of inquiry was not immateriality—the objecting attorney (and, also, the Trial Examiner) recognized that petitioner might properly attempt by competent evidence to identify strikers as participants in strike misconduct (R. 433, 441)— but, rather, that in the circumstances petitioner had ventured upon nothing more than a random "fishing expedition" (R. 442). The Trial Examiner indicated that petitioner was not precluded from going into this line of inquiry, placing his ruling on the ground that the particular questioning was not "the way it should be done" (R. 442).[3] Accordingly, the only issue is whether this ruling was within the authority of the Trial Exam-

[3] Although the Examiner added that (R. 442) "I think that as the record stands now these matters are immaterial," it is clear from this statement, particularly when read in the light of his preceding remarks—"I think that there are proper ways of proving matters. I don't think this is the way it should be done"—that "immaterial" was used, not in the sense that evidence of misconduct by the strikers was not germane to the issues, but only to indicate that the particular means used to elicit that evidence was improper.

It should be noted, however, that such evidence was material only with respect to one of the two issues on which petitioner sought to adduce it, viz., the appropriateness of reinstatement as a remedy. For evidence of strike misconduct which comes to light for the first time in the hearing obviously can have no bearing on petitioner's motive for refusing to reinstate the strikers at the time of their application (see p. 5, *supra*).

iner to control the manner of proof at the hearing.

Petitioner's concession at the hearing that it had conducted no previous investigation to determine whether the strikers whom it wished to call as witnesses had any relevant information as to the identity of those responsible for the property damage in question (R. 440) justifies the Trial Examiner's ruling. To permit such questioning in these circumstances would allow an attorney to substitute the hearing for an investigation of his case, and to ask random questions of witnesses, where he has no knowledge as to whether they could give any relevant testimony, in the hope that something might turn up that would help his case. See *Storm* v. *United States*, 94 U.S. 76, 84-85. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 236.

Petitioner's contention that the Board did not "give any reasons why it thought the exception [to the Trial Examiner's evidentiary ruling] should be overruled" (Pet. 19) is on no firmer footing. As shown above, the Trial Examiner gave the basis of his ruling, and the Board, in its decision, stated that it had reviewed the rulings of the Trial Examiner and that such rulings were affirmed. When the Board is satisfied with the Examiner's rulings, it is assuredly free to adopt them. "Further particularity is not required." *National Labor Relations Board* v. *State Center Warehouse Co.*, 193 F. 2d 156, 158 (C.A. 9). See, also, *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 652-653 (C.A. 6), and cases there cited.

2. The refusal of the court below to remand the case to permit petitioner to offer evidence that certain of the strikers participated in misconduct during the strike does not present a question warranting review by this Court.[4] Although petitioner asserted in its motion to remand that the supporting affidavit was initially made available to it following the decision of the court below, petitioner made no showing that it could not have obtained the information contained in the affidavit by a proper investigation of its case in the first instance. Thus, the affidavit shows at most that petitioner might have been able to adduce some evidence favorable to it had it originally prepared and tried its case in accordance with conventional practice. This showing neither impairs the correctness of the Trial Examiner's ruling that petitioner did not follow proper procedure in attempting to put its evidence into the record, nor does it entitle petitioner as of right to another opportunity to retry its case correctly.

The conclusion that the Court of Appeals did not abuse its discretion is supported not only by the circumstance that the normal risk of failing to present evidentiary matters within the framework of the hearing officer's rulings is the exclusion of that part of the case, but also by the fact that more than four

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[4] Petitioner's complaint (Pet. 23) that the motion for a remand was not specifically ruled upon by the court below is groundless. The denial of the two motions for rehearing necessarily constitutes a denial of the motion for a remand as well. See *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104.

years elapsed between the discharges which set off the strike and the production of the affidavit in question. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll* v. *Gottlieb*, 305 U.S. 165, 172. See also, *Mine, Mill and Smelter Workers* v. *Eagle-Picher Co.*, 325 U.S. 335.

3. Petitioner complains finally (Pet. 13-15) that Judge Huxman, a retired judge of the circuit, participated in the *denial* of petitioner's application for rehearing *en banc*[5]—a denial in which all of the active circuit judges also participated and in which none noted dissent. This, of course, is a quite different situation from that presented in *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, in which this Court held that a retired judge might not participate in the ultimate decision of a case in which a rehearing *en banc* had been ordered. This distinction was, indeed, most plainly drawn in the *American-Foreign* case itself, in which the Court stated (p. 688):

> Moreover, there is not involved here any issue as to the procedure to be followed by a Court of Appeals in determining whether a hearing or rehearing *en banc* is to be ordered. In the *Western Pacific Railroad Case*, 345 U. S. 247, it was held that this question is largely to be left to intramural determination by each of the Courts of Appeals. "The court is left free to devise its own administrative machinery to pro-

[5] Petitioner did not advance this contention in the court below.

vide the means whereby a majority may order such a hearing." 345 U. S. at 250.

Here we are concerned only with the specific provision of the Judicial Code which ordains that *en banc* proceedings shall be "heard and *determined*" by a court consisting of all the "*active* circuit judges" of the circuit involved. The literal meaning of the words seems plain enough. An "active" judge is a judge who has not retired "from regular active service." 28 U.S.C. § 371 (b). A case or controversy is "determined" when it is decided. [*]

28 U.S.C. 46(c) provides that a rehearing *en banc* may be ordered "by a majority of the circuit judges of the circuit who are in active service." If in this case a majority of the active circuit judges had voted for rehearing *en banc*, unquestionably it would have been so ordered by the court without regard to any contrary view of Judge Huxman. As a retired judge, his "vote" obviously could not have been counted under the statute in determining whether there was

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[*] In the *American-Foreign* case, the United States advised this Court as follows (Reply Brief, p. 4):

> "* * * there would appear to be no reason why a retired or assigned judge who has sat in the case may not take part in the consideration of a petition for rehearing *en banc* if the court of appeals chooses to allow such a procedure. But it does not follow that a retired or assigned judge may effectively vote to *grant* a rehearing *en banc*. * * * We are aware of no case in which rehearing *en banc* was *granted* on the basis of a vote by any judge who was not a circuit judge of the circuit in active service. * * *" [Italics in original.]

This view, to which we adhere, finds confirmation in the Court's *American-Foreign* opinion, as the excerpt quoted in the text indicates.

a majority of the active judges in favor of granting rehearing *en banc*. And there is not the slightest indication that any such situation arose in the instant case. So far as appears, none of the active circuit judges voted for rehearing. Thus, on the facts here, there is no basis for suggesting either that 28 U.S.C. 46 (c) has been violated or that petitioner has suffered any prejudice as a result of Judge Huxman's participation in the court's deliberations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY

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September 23, 1960

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PETITIONER'S REPLY

The Board's Brief in Opposition is a bundle of distortions and omissions. These, however, cannot obscure the important questions presented by the Petition.

I

The Brief in Opposition notably misdescribes the events whereby the trial examiner shut petitioner off from adducing evidence as to a connection between serious misconduct and striking employees.

The Board's Brief in Opposition (page 6) states, and quite incorrectly:

> "However, noting that counsel for petitioner had admitted that he had no knowledge of whether the witness had any relevant information about the matter, and that he had not made any investigation in this respect before calling the witness to the stand, the Trial Examiner concluded: 'I think that there are proper ways of proving matters. I don't think this is the way it should be done' (R. 440, 442)."

Neither the trial examiner nor the Board nor the Board's attorneys have ever suggested what could have been a more "proper way" of proving these matters than by doing what petitioner did here—namely, calling as witnesses to testify under oath the striking employees themselves, who were the very persons possessing the most direct information concerning the important matters being inquired into. Indeed, the record makes it clear that calling the strikers to testify was the only practical way of getting direct evidence on the existence of any connection between the strikers and the serious acts of misconduct stealthily committed.

In any event, examination of the record will show that, contrary to what the Board's Brief in Opposition asserts, petitioner's counsel did not "admit"—nor did the trial examiner "note" any such non-existent admission—that petitioner's counsel "had no knowledge of whether the witness had any relevant information about the matter". In fact, petitioner's counsel furnished the trial examiner with a number of eminently sensible reasons why petitioner's counsel thought the witness McOsker probably did have relevant information about the matter—such as McOsker's presence in the critical area for extensive periods of time, and McOsker's role as an energetic picketer (R. 438, 439,

440). Moreover, even if (contrary to actual fact) petitioner's counsel had made any such admission and even if (contrary to actual fact) the trial examiner had relied on it, this would not have furnished the slightest justification for the trial examiner's denial of fair hearing on this fundamental issue. However erroneous and unintelligible the trial examiner's ruling may have been, it is clear that, as the Board's Brief in Opposition (page 8) is now compelled to acknowledge, the trial examiner did rule the entire line of inquiry to be "immaterial".

The Board's Brief in Opposition (page 6) next states: "No further effort was made by petitioner to adduce evidence that the strikers had committed any misconduct". This gives the wholly incorrect impression that petitioner made no effort whatsoever—except through the single witness McOsker—to prove a connection between the strikers and the serious acts of misconduct. But the record shows that immediately after the trial examiner ended the long colloquy by announcing a definitive ruling which prevented this entire line of inquiry from being put to the witness McOsker (R. 442), the following occurred (R. 443; and see Petition, page 9):

> "Mr. Moyer [petitioner's counsel]: In the courtroom, Mr. Examiner, I don't know, six or seven other persons who have been called in a manner similar to Mr. McOsker and they want to leave. I have paid them their witness fees and I think if they want to leave, why, I, of course, have no further reason to call those people.
>
> "Trial Examiner: Well, for your record, Mr. Moyer, let's say this, that the Examiner's ruling would be the same in the event that the respondent called K. Darrel Cole, Leeland D. Daley, Joseph J.

> Goulart, Marlow D. Hippen, Marilyn G. Menefee, Edward L. Millar, L. V. Parsons,[1] who are the persons whom I know the respondent has served.
>
> "Mr. Moyer: Very well, sir, and then in order to abide by that ruling I shall release those witnesses from the subpoena."

Thus, the record fully shows petitioner's extensive effort to be allowed to adduce, from this large group of competent witnesses, testimony which would establish whether there was a connection between the strikers and the serious acts of misconduct. The trial examiner would not allow a single question along these lines to be asked of any of them.

The Board's Brief in Opposition (page 9) finally observes on this matter:

> "Petitioner's concession at the hearing that it had conducted no previous investigation to determine whether the strikers whom it wished to call as witnesses had any relevant information as to the identity of those responsible for the property damage in question (R. 440) justifies the Trial Examiner's ruling."

What the record actually shows on this point at R. 440 is the following:

> "Trial Examiner: I am interested in that you have made no comment as yet that indicates that there has been any personal contact or interview with Mr. McOsker which leads you to believe that he could give you information.
>
> "Mr. Moyer [petitioner's counsel]: I will say this, Mr. Examiner, that so far as I am concerned,

[1] As stated in the Petition (page 7, note 4), all seven of these individuals, as well as McOsker, were striking employees included in the Board's reinstatement order (R. 83).

> the respondent's counsel, Mr. Cranmer,[2] is his attorney. Under the rules of practice and ethics in the State of Kansas, a lawyer is prohibited from talking to the client of another attorney. . . . And I have so conducted this entire case. I have never talked on matters pertaining to the case to any of the picketers, either on the picket line or after or during or anything, for that reason."

If petitioner had sought to interrogate these strikers prior to the Board hearing, it may safely be surmised not only that this would have been impossible, but also that the Board itself would have been the first to complain. In any event, the most appropriate place for petitioner to interrogate the striking employees as to their connection with the serious acts of misconduct was when they were witnesses under oath at the hearing. They were the proper people to interrogate in order to get direct evidence on the matter; and petitioner took every reasonable step to do so. Despite petitioner's vigorous efforts the trial examiner, sustaining objections by the Board's trial attorney, completely shut petitioner off from doing so. The record does not offer even the flimsiest justification for this denial of a fair hearing.

II

The Board's Brief in Opposition (page 6) asserts: "The Board 'reviewed the rulings of the Trial Examiner made at the hearing,' and adopted them (R. 71)."

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[2] Mr. Cranmer appeared in the proceeding on behalf of the complaining union (R. 84). Also, as attorney for the individuals who went on strike (including the eight whose testimony the trial examiner prevented petitioner from adducing at this hearing), Mr. Cranmer had written the letter demanding reinstatement of the striking employees (R. 33).